

Barua (Migration) [2018] AATA 106 (15 January 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Nipu Barua
VISA APPLICANT:	Mrs Papia Barua Priya
CASE NUMBER:	1619173
DIBP REFERENCE(S):	BCC2015/1225091 OSF2015/040016
MEMBER:	Russell Matheson
DATE:	15 January 2018
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Statement made on 15 January 2018 at 3:13pm

CATCHWORDS

Migration – Partner (Provisional) (Class UF) – Subclass 309 (Spouse (Provisional) – Sponsor divorced – Tribunal is not satisfied sponsor is legally divorced under Bangladesh law – De facto relationship – Relationship did not meet the 12 month requirement – Compelling and compassionate reasons – Arranged marriage in Bangladesh

LEGISLATION

Migration Act 1958, ss 5CB, 5F, 65

Migration Regulations 1994 rr 1.09A, 2.03A, Schedule 2 cls 309.211, 309.221

CASES

Paduano v MIMIA [2005] FCA 211

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 2 November 2016 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
2. The visa applicant is a 25 year old female national of Bangladesh. She applied for the visa on 27 April 2015 on the basis of her relationship with her sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include cl.309.211(2).
3. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) because the delegate was not satisfied the applicant was the spouse of the sponsor. The sponsor (review applicant) seeks review of the delegate's decision.
4. The sponsor appeared before the Tribunal on 28 November 2017 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant and a witness Biton Barua.
5. The review applicant was not represented in relation to the review by his registered migration agent.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in the present case is whether the applicant is the spouse of the sponsor as defined in s.5F of the Act.
8. The Tribunal has before it the Departments file relating to the applicant; its own file; and a copy of the Department's decision provided by the sponsor (review applicant) to the Tribunal.
9. The evidence the Parties provided at the Tribunal hearing is recorded throughout this decision record. _

WHETHER THE PARTIES ARE IN A SPOUSE OR DE FACTO RELATIONSHIP

10. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
- 11.
12. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must

be married to each other under a marriage that is valid for the purposes of the Act: s.5F(2) (a).

ARE THE PARTIES VALIDLY MARRIED?

13. The sponsor has previously been married to Ms Lucky Akter who is a Muslim on 10 March 2004 and claims to have divorced her on 20 June 2011. The sponsor told the Tribunal that he was married to Ms Akter and the marriage was solemnized under Buddhist Law. The sponsor stated that his divorce to his previous wife Ms Akter was executed under Muslim Family Law. It should be noted that in Bangladesh a Buddhist male is not allowed to marry a Muslim female under Muslim Family Law.
14. The Tribunal brought to the attention of the sponsor that Muslim Family law Ordinance 1961 which sets out formal requirements for the recognition of Muslim marriage and divorces in Bangladesh. In particular, Section 1 lays out the extent, application and commencement of this law. 'Section 1.2 extends to the whole of Bangladesh and applies to all Muslim citizens of Bangladesh, wherever they may be.'
15. The Tribunal also brought the relevance of Section 1.2 to the attention of the sponsor. As such the law applies to all Muslim citizens of Bangladesh. The sponsor has informed the Department and the Tribunal that he was married to his previous wife under Buddhist religion and laws. The marriage is not registered under the Muslim Family law as a marriage between a Buddhist male and Muslim female is not permitted by Muslims Family Law. As such the marriage between the sponsor and his previous wife cannot be finalised under the Muslim Family Law.
16. The sponsor told the Tribunal that he believed that his divorce was legal because it was done to procedure and when he was married the second time to the applicant he wasn't harassed and no ransacking of his family premises in Bangladesh occurred. The sponsor said that his lawyer arranged the divorce and he was not sure if the lawyer did his job properly. Further stating that his lawyer should have known the law. The sponsor said that he made a grievous mistake when he was young and all he wanted to do is live a peaceful life.
17. The sponsor provided the original copies of documents previously presented to the Department as documents of relevance in relation to his divorce from his first wife. The integrity of these documents have been scrutinised and evaluated by the delegate in relation to the legality of sponsors divorce. The documents are discussed in the delegate's decision provided by the sponsor in the Tribunal file, folios 1-5.
18. The Tribunal after considering the delegate's assessment of the documents and the sponsor's evidence given at the Tribunal hearing has concerns as to whether the applicant has legally divorced his previous wife. The sponsor has provided to the Tribunal the original marriage certificate showing that he was married to his previous wife under Buddhist law and translated documents showing that he has been divorced in accordance with The Muslim Family Act, Ordinance 1961. As previously stated the marriage is not registered under the Muslim Family law as a marriage between a Buddhist male and Muslim female is not permitted by Muslim Family Law. As such the marriage between the sponsor and his previous wife cannot be finalised under the Muslim Family Law. Therefore the Tribunal is not satisfied the sponsor is divorced from his previous wife Ms Lucky Akter.
- 19.
20. The Tribunal is not satisfied that sponsor has been legally divorced from his first wife under Bangladesh law on the evidence presented by the sponsor. The Tribunal considers that the

sponsor was still legally married to his previous wife Ms Lucky Akter on the date of his marriage to the applicant on 17 November 2014.

21. On the evidence, the parties were not married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

ARE THE PARTIES IN A DE FACTO RELATIONSHIP?

22. As the visa applicant and review applicant are not married to each other under a marriage that is valid for the purposes of the Act, they cannot satisfy an essential requirement of a spouse relationship, but may meet the criteria on the basis of being in a de facto relationship as defined in s.5CB of the Act. A person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
23. In forming an opinion whether they are in a de facto relationship, consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.09A(3) which is attached to this decision.
24. The Tribunal had the benefit of the applicant's, the sponsor's and a witness's oral evidence at the Tribunal hearing. The Tribunal gave all the evidence provided by the parties and witness at the Tribunal hearing and evidence provided by the applicant to the Department in the primary application and Tribunal file due regard.

25. Financial aspects

26. The Tribunal has considered the financial aspects of the relationship including any joint ownership of real estate or major assets, any joint liabilities, the extent of any pooling or sharing of financial resources, whether any person in the relationship owes any legal obligation in respect of the other, and the basis of any sharing of daily household expenses and any combined future financial commitments or plans.
27. The Tribunal accepts there is a degree of difficulty in establishing and sharing financial resources when the sponsor and applicant live in separate countries. The sponsor stated that he sends money transfers to the applicant on a regular basis through an SBX agent at Eastlake shopping centre and the money is used by the applicant for daily living expenses, personal items and her education. The applicant said that the money transferred is deposited into her bank account in Bangladesh and she uses a pin number to withdraw the money from her account. The sponsor provided money transfer receipts totalling seven thousand six hundred and thirty dollars deposited into the applicants account between the periods February 2015 to October 2017. The Tribunal accepts that the sponsor provides financial support to the applicant and places some weight on this aspect.
28. The sponsor stated that he has a mortgage on a property in Minto and receives three hundred and thirty dollars a week rent from the property and the mortgage is four hundred and twenty dollars per week. Further stating that he currently rents a property in a shared arrangement with three other people paying five hundred and twenty dollars a week rent. The sponsor said that he works full time as a cleaner at UTS.

29. The applicant had a sound knowledge of the sponsors assets, income, employment and current living arrangements. The Tribunal places some weight on this aspect of the relationship.
30. The parties stated that they have no joint savings or bank accounts and have not made any joint purchases. The Tribunal accepts that it is difficult for people living in separate countries to share or pool their finances resources. The Tribunal is satisfied that the sponsor supports the applicant financially.

31. Nature of the household

32. The Tribunal has considered the nature of the household including any joint responsibility for the care and support of children if any, living arrangements of the parties and the sharing of the responsibility for housework.
33. The sponsor told the Tribunal that the parties' marriage was an arranged marriage organised by both the parties' families. Further stating that the parties met for the first time in person on 11 November 2014 at the applicant's family home, became engaged the very next day on 12 November 2014 and married five days later on 17 November 2014. The applicant said that the parties married in such a short time because the marriage was settled by both families quickly because the families had mutual relatives. The parties said that they live with each other and share their time living with both their families in Bangladesh when the sponsor visits. The parties presented no evidence of cohabitation with their families in Bangladesh.
34. The parties stated that they shared their time when the sponsor visited the applicant in Bangladesh with the sponsor's family and applicant's family and that the household responsibilities were shared amongst the whole family in each household. Other than the parties oral evidence there is no other evidence such as photographic or documentary evidence of the parties visiting and living with each other's families in Bangladesh. The parties provided a number of photographs of themselves in each other's company when the sponsor last visited the applicant in Bangladesh from January to March 2017. There is little evidence to support that the parties have cohabitated together in Bangladesh. The Tribunal is not satisfied that they live together and the parties share the household duties and responsibilities. The Tribunal places little weight on this aspect of the relationship.

35. Social aspects

36. The Tribunal considered the social aspects of the relationship, including whether the parties represent themselves to other people as being married to each other, the opinion of friends and acquaintances about the nature of the relationship, and any basis on which the parties plan and undertake social activities.
37. The sponsor stated that on his recent trip to visit the applicant in Bangladesh from January to March 2017 the parties attended a number of religious ceremonies and festivals, visited family and friends went to the park and went shopping together.
38. The sponsor told the Tribunal the parties went to a wedding of a friend from the Buddhist community from Australia but could not remember the groom's name. Further stating that the groom was the son of Samiran Budura a friend in Australia. The sponsor also said that he could not remember the date of the wedding and said it was somewhere between January and February 2017. The sponsor did not produce any evidence such as an invitation to attend the wedding or photographs supporting his claim that the parties attended the wedding and was very vague when giving his evidence about the wedding.

39. The sponsor also stated that he had travelled with his migration agent and his family with the applicant and her sister to Cox's Bazar on holiday together in January 2017.
40. The applicant provided two 888 declarations attesting to the relationship between the parties with the primary visa application. They both say that they are friend with the applicant, play soccer with him, congratulated him on his wedding and have spoken to the applicant on the phone. The statements give little insight into the relationship and use the same terminology the Tribunal places little weight on the statements.
41. The Tribunal accepts that the parties have provided photographic evidence of their wedding and photographs of themselves with each other but there is little other evidence to support their stated social activities together and with friends and that they represent themselves to others as being in a genuine and committed relationship. The Tribunal places little weight on this aspect of the relationship.

42. Commitment

43. The Tribunal has considered the nature of the parties' commitment to each other, including the duration of the relationship, the length and time the parties have lived together, the degree of companionship and emotional support they provide each other, and whether the parties view the relationship as a long-term one.
44. The parties stated that their marriage was an arranged marriage organised by both their families. The applicant's evidence in his statement said that he was thinking visiting his family in 2014 in Bangladesh and told them he was planning to get married when he arrived in Bangladesh and asked his family to select a bride for him. The applicant and sponsor met each other for the first time on 11 November 2014 at the applicant's parent's family home with the sponsor and his family. The parties were introduced, had a conversation in private and decided to marry immediately. The parties became engaged on 12 November 2017 and a ceremony was held at a local community centre. The parties were then married on the 17 November 2017 before family and friends in a Buddhist ceremony in Bangladesh. The applicant and sponsor had a honeymoon for five days from 27 December 2014 to 1 January 2015 and then the sponsor returned to Australia on 13 January 2015. The sponsor provided evidence of travelling to visit the applicant on two other occasions since their marriage. These periods were from 15 January 2016 to 21 February 2016 and 27 January 2017.
45. The sponsor said that he wanted to bring the applicant to Australia to start a decent family life and have a family together. The applicant said her life plan was to live together with the sponsor in Minto and start a family together. The parties' stated that they cared for and supported each other during times of separation and remained in constant contact through Facebook and Skype. The parties provided documentary evidence of their communication between each other.
46. The Tribunal is satisfied the applicant and the sponsor provide each other with a reasonable degree of companionship and emotional support and some aspects of their relationship indicate that they are in a genuine and continuing relationship. The Tribunal is satisfied the couple view their relationship as a long term one.

47. Findings

48. The tribunal has some concerns that there is little evidence supporting the social aspects and the parties' cohabitation together. The Tribunal accepts the weight of the evidence in support of the parties being in a genuine and continuing relationship outweighs the evidence against.

49. Overall, The Tribunal is satisfied that at the time of application the applicant and sponsor had a mutual commitment to a shared life as de facto partners to the exclusion of all others that their relationship is genuine and continuing and they do not live separately and apart on a permanent basis. The Tribunal has no evidence that the parties' are related by family. Therefore the applicant meets the requirements of s.5CB(2)(a)-(d).
50. The Tribunal is satisfied, having regard to the totality of the circumstances, that the applicant and the sponsor have a mutual commitment to a shared life to the exclusion of all others. The Tribunal is satisfied their relationship is a genuine and continuing relationship.
51. The Tribunal is satisfied after considering all the circumstances of the relationship the parties were in a de facto relationship at time of application.
52. On the basis of above the Tribunal is satisfied that the requirements of 5CB(2)(a)-(d) of the Act are met at the time of application.

ARE THE ADDITIONAL CRITERIA FOR A DE FACTO RELATIONSHIP MET?

53. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A. Both members of the couple must be at least 18 years old: r.2.03A(2). In this case, at the time of application, the applicant and the sponsor were at least 18 years old.
54. The applicant must have been in the de facto relationship for at least the 12 month period ending immediately before the date of the application: r.2.03A(3). This requirement will not apply in limited circumstances, such as: where the de facto relationship has been registered under a relevant State or Territory law (for applications made on or after 9 November 2009); where the applicant can establish compelling and compassionate circumstances for the grant of the visa; or in certain circumstances where the sponsor held, holds or is applying for a permanent humanitarian visa.
55. There is no evidence that the relationship is registered under a relevant State or Territory law or that the sponsor held, holds or is applying for a permanent humanitarian visa, so they must meet the 12 month requirement. The Tribunal having considered all the circumstances of the relationship between the applicant and the sponsor was not satisfied that the applicant was legally divorced from his first wife. The Tribunal then went on to consider if the applicant and sponsor were in a de facto relationship.
56. The applicant and sponsor were married in Bangladesh on 17 November 2014 and the visa application was lodged on 27 April 2015. Therefore, their relationship has been formally in existence for a period of five months at the time of application and they have been residing together and committed to a shared life together to the exclusion of all others for five months prior to application. Accordingly, the Tribunal is not satisfied that the applicant had been in the de facto relationship for at least the 12 month period ending immediately before the date of the application.
57. The Tribunal told the applicant and sponsor as they did not meet the twelve month requirement to establish that they were in a de facto relationship and the Tribunal asked the parties if they could establish compelling and compassionate reasons for the grant of the visa.
58. Therefore, the issue before the Tribunal is whether the visa applicant can establish compelling and compassionate circumstances for the grant of the visa: r.2.03A(3). The expression 'compelling and compassionate circumstances for the grant of the visa' is not defined in the legislation.

59. Having regard to the ordinary meaning of the words, 'compassionate' suggests 'circumstances that invoke sympathy or pity'. 'Compelling' in its wide, ordinary meaning means 'forceful' and, therefore, convincing: see *Paduano v MIMIA* [2005] FCA 211. The Tribunal questioned the applicant and sponsor as to whether there were any compelling and compassionate reasons for the grant of the visa.
- The applicant told the Tribunal that the sponsor had been married before and the marriage ran out and the sponsor has no connection with Islam, further stating that she wished to live with the sponsor in Australia for peace of mind because she can't live with him all year round. The applicant said that the sponsor worked in Australia and can only come to Bangladesh on vacation.
 - The sponsor said that he had been fighting and working hard to live a normal life with the applicant and had purchased a house for them to reside in at Minto. Further stating that he wanted to stay together with the applicant and lead a decent normal life together.
60. The Tribunal is not satisfied the reasons given by the applicant and sponsor that they wish to live in Australia and lead a normal decent life together, that the sponsor works in Australia and that he has purchased an investment property in Minto and that he can only visit the applicant on vacation are convincing reasons that establish compelling and compassionate reasons for the grant of a visa. The parties provided no evidence or reasons as to why they could not maintain their relationship whilst living together in Bangladesh or why the sponsor could not be gainfully employed overseas. The Tribunal does not accept the assumption made by the parties that the purchase of a property is the precursor for the grant of the visa.
61. Furthermore the Tribunal is not satisfied that the applicant made the appropriate enquires to establish that the sponsor was divorced from his previous wife and the parties were legally married. The Tribunal does not accept the reasoning or assumption from the applicant that the marriage ran out and the sponsor has no connection with Islam constitute compelling and compassionate reasons for the grant of the visa. Accordingly, the Tribunal is not satisfied that there are compelling and compassionate circumstances for the grant of the visa.
62. The parties have stated that they have strong family and community links in Bangladesh and the Tribunal is of the view that they have the capacity to live together in a partner relationship and raise a family in Bangladesh if they choose to do so. The Tribunal accepts that it may be harder for the sponsor to gain employment in Bangladesh but does not find that aspect prohibitive to maintaining a genuine and continuing relationship between the parties.
63. For these reasons the Tribunal is not satisfied that the visa applicant meets the additional criteria prescribed in r.2.03A.
64. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

65. The Tribunal affirms the decision not to grant the visa applicant a Partner (Provisional) (Class UF) visa.

Russell Matheson
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB (2) (a), (b), (c) and (d) of the Act exist.

Note 1 See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2 The effect of subsection 5CB (1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB (2) sets out conditions about whether a de facto relationship exists, and subsection 5CB (3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).